UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

ARC BRIDGES, INC.

and **Case 13-CA-44627**

AMERICAN FEDERATION OF PROFESSIONALS

BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF OF CHARGING PARTY AMERICAN FEDERATION OF PROFESSIONALS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:

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I. PRELIMINARY STATEMENT

On May 28, 2008, pursuant to a charge filed by the American Federation of Professionals (herein called "the Union"), Counsel for the General Counsel issued a Complaint and Notice of Hearing against ARC Bridges, Inc. (herein called "Respondent"). The Complaint alleged that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to grant a wage increase to employees represented by the Union because they joined, supported and assisted the Union, and to discourage membership in the Union. On June 4, 2008, Counsel for the General Counsel issued an Amendment to Complaint.[1] On June 17, 2008, Respondent filed an Answer to Amended Complaint, denying that its conduct violated the Act.[2] On July 28, 2008, a hearing in

[1] At the outset of the hearing, Counsel for the General Counsel offered a further few minor amendments to the Amended Complaint. (Tr. 8 - 9).

[2] Respondent also affirmatively pled that the manner in which the Union affiliated with another labor organization voided its status as the workers' exclusive representative. At hearing, Respondent waived its affirmative defense. (Tr. 23 - 24).

this matter was held before Administrative Law Judge Gerald Wacknov in Chicago, Illinois.

On December 31, 2008, the Administrative Law Judge issued a Decision and Recommended Order, recommending that the complaint be dismissed. The ALJ first held that "it seems clear...that an annual wage increase in July of each year...had in fact become a condition of employment...." ALJD 11, fn. 12.[3] After examining substantial evidence showing Respondent's Union animus, the ALJ determined the General Counsel's contention that Respondent failed to provide the wage increase to bargaining unit employees because of their support for the Union to be "clearly plausible." ALJD 13. Nonetheless, the ALJ held that the General Counsel failed to establish a prima facie case under *Wright Line* because it did not prove "that the Respondent's rationale for withholding the wage increase is inherently implausible, or unsupported by the record evidence, or materially inconsistent with other conduct, or that it was advanced merely as a pretext to mask discriminatory behavior." ALJD 13. In so doing, the ALJ turned the *Wright Line* analysis on its head. Contrary to the ALJ's Decision, the General Counsel was not required to prove that Respondent's stated rationale was "inherently implausible" in order to make its prima facie case. Indeed, the General Counsel established its prima facie case by proving that Respondent's unlawful motivation played a role in its refusal to provide the wage increase.

The ALJ then failed to properly shift the burden to Respondent to prove that it would have refused to provide the wage increase regardless of the employees' protected activity. Respondent offered numerous, shifting rationales for withholding the wage increase, some of which actually openly cited the Union's protected activity as the basis for its action. The ALJ's

[3] "ALJD 11, fn. 12" refers to Administrative Law Judge's Decision and Recommended Order page 11, footnote 12. Similar notation is used throughout this document.

Decision failed to even acknowledge a number of Respondent's incriminating admissions from hearing. Contrary to the ALJ's Decision, Respondent failed to prove that it would have withheld the wage increase for non-discriminatory reasons.

The ALJ's Decision is based on a misapplication of long-standing Board law to the facts of this case. As such, the Union now respectfully requests that the Board grant its Exceptions for the following reasons.

II. DISCUSSION

Respondent failed to grant a July 2007 cost of living adjustment to its Union represented employees because of their protected activities. The Board has long held that an employer who withholds a pay raise from employees for engaging in protected activities violates the Act if the employees otherwise would have been granted the raise in the normal course of the employer's business. *Choctaw Maid Farms*, 308 NLRB 521, 527 (1992). As such Respondent has violated Section 8(a)(1) and (3) of the Act. *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155 (1998).

A. Contrary to the Administrative Law Judge's Decision, the General Counsel established its prima facie case that the workers' protected activity was a motivating factor in Respondent's refusal to grant the July 2007 wage increase.

The ALJ's Decision erroneously holds "that the General Counsel has not sustained her burden of proof under *Wright Line* by proving by a preponderance of the evidence that the employees' protected activity was a motivating factor for the Respondent's withholding of the wage increase...." ALJD 13. The ALJ's Decision failed to utilize the proper standard in determining if the General Counsel established a prima facie case. The ALJ further compounded this error by misapplying his own factual findings to the legal standard.

To establish a prima facie case of a violation of Section 8(a)(3), the General Counsel must show, by a preponderance of the evidence, that a protected activity was a motivating factor in the employer's decision to take the adverse employment action. *Wright Line*, 251 NLRB 1083, 1089 (1980). In essence, the General Counsel must show that: (1) the employees engaged in a protected activity, (2) the employer knew of the activity, and (3) union animus was a motivating factor in an adverse employment action that has the effect of discouraging union activity. *General Trailer Inc.*, 330 NLRB 1088, 1092 (2000).

1. Contrary to the Administrative Law Judge's Decision, in making its prima facie case, the General Counsel is not required to prove that an employer's stated rationale for its adverse employment action is "inherently implausible", "unsupported by the record evidence", "materially inconsistent with other conduct", or "that it was advanced merely as a pretext to mask discriminatory behavior."

The ALJ here recognized that the substantial record evidence of Respondent's anti-Union bias, Respondent's agents' contemporaneous statements and Respondent's sudden unilateral departure from its established practice of providing across-the-board wage increases all make it "clearly plausible" that Respondent was motivated by a discriminatory intent. ALJD 13. Nonetheless the ALJ determined that the General Counsel failed to establish the prima facie case, because it did not show that "Respondent's rationale for withholding the wage increase is inherently implausible, or unsupported by the record evidence, or materially inconsistent with other conduct, or that it was advanced merely as a pretext to mask discriminatory behavior." ALJD 13. In so doing, the ALJ effectively added a fourth element that the General Counsel must prove to establish a prima facie case under *Wright Line*. In addition to the three traditional elements of the *Wright Line* prima facie case, the ALJ's Decision required the General Counsel

to prove that the employer's stated rationale for the adverse employment action is pretextual.

Despite the ALJ's decision, Board precedent has long established that "in assessing whether a prima facie case has been presented, shifting the burden of persuasion to the Respondent, a judge must view the General Counsel's evidence in isolation, apart from a respondent's proffered defense." *Bali Blinds Midwest*, 292 NLRB 243, 243 fn. 2 (1989), citing *Hillside Bus Corp.*, 262 NLRB 1254 (1982). Moreover, in determining whether the General Counsel has established a prima facie case under *Wright Line*, "[t]he test is not whether the Respondent has proffered a lawful defense for its action, but whether, viewed in isolation, the General Counsel's evidence supports an inference that protected activity was a motivating factor" in the adverse employment action. *Cine Enterprises*, 301 NLRB 446, 447 (1991). Nonetheless, the ALJ here failed to view the evidence regarding the prima facie case in isolation. The ALJ determined that the General Counsel failed to establish a prima facie case because it could not disprove Respondent's articulated defense. The ALJ essentially conflated the elements of the prima facie case and Respondent's rebuttal, erroneously placing the burden of persuasion for all components of the case on the General Counsel.

In establishing its prima facie case, the General Counsel "does not have to prove that unlawful animus was the 'proximate cause' for the decision to discriminate." *United States Postal Service*, 352 NLRB No. 115 (2008). The general counsel does not have to show "that in the absence of such animus, no adverse employment action would have taken place." *Id.* Instead, the General Counsel "only must prove, by a preponderance of the evidence, that union animus was a 'substantial or motivating factor' in the adverse employment action." *Id.* Yet, in this case, the ALJ held that although Respondent's discriminatory motive was "clearly

plausible", since Respondent's asserted rationale was "also feasible", the General Counsel did not establish it's prima facie case. ALJD 13. As such, the ALJ erroneously required the General Counsel to prove that unlawful Union animus was the proximate cause of Respondent's refusal to provide the wage increase in assessing its prima facie case.

If the ALJ had utilized the appropriate *Wright Line* standard, he would have found that the General Counsel established all three elements of the prima facie case.

2. The workers engaged in protected activity and Respondent knew of that activity, establishing the first two prongs of the prima facie case.

In the present matter, the General Counsel unquestionably established the first two elements of the prima facie case; Respondent was obviously aware that the workers had engaged in protected activities. In two separate campaigns, the workers organized and voted the Union to act as their exclusive bargaining representative. ALJD 2. Moreover, Respondent had engaged in contract negotiations with the Union for months before its failure to provide the cost of living adjustment. ALJD 3. Finally, at hearing Respondent repeatedly referenced the Union's strike authorization vote in August 2007 as a motivating factor in its refusal to provide the Union represented workers with the three percent raise. (Tr. 344 - 345, 380 - 381). As such, the General Counsel has undeniably established the first two prongs of its prima facie case.

3. Respondent's Union animus was a motivating factor in its refusal to provide the Union represented workers with the cost of living adjustment, establishing the third prong of the prima facie case.

Respondent's express statements, history of unfair labor practices, disparate treatment of Union represented workers and departure from established practice, as well as the timing of Respondent's actions all lead to the unavoidable conclusion that Respondent's Union animus

was a motivating factor in its failure to grant the wage increase to represented employees.

a. Respondent's express statements show its discriminatory intent.

Obviously, an employer's express statements can be used to prove its anti-union motivation for changing its established practice of pegging wage increases for different units of workers. *Kurdziel Iron*, 327 NLRB at 155. Respondent has been very candid that it withheld the raise because of the workers' Union activities.

In his Decision, the ALJ cited the testimony of bargaining unit member Shirley Bullock that near the end of July or beginning of August 2007, around the time the workers would have been expecting their cost of living adjustments, Bonnie Gronendyke, Residential Department Area Manager and a member of Respondent's bargaining committee, "told her that Kris Prohl [Respondent's Executive Director] 'was going to give us a raise until we voted the Union in.'" ALJD 10. At hearing, Ms. Gronendyke contradicted Ms. Bullock's testimony; Ms. Gronendyke "testified that she did not make this statement to Bullock." ALJD 10. Ultimately, the ALJ discredited Gronendyke's testimony and held that she had, in fact, told Bullock that Kris Prohl had intended to give the workers a wage increase, but decided not to because of the Union.

Similarly, the ALJ found that in August 2007, Ray Teso, Coordinator of Follow Along Coaches and a member of Respondent's bargaining committee, told bargaining unit member Teresa Pendelton that Ms. Prohl had intended to provide the Union represented workers with a wage increase but did not do so and instead spent that money on lawyers; Mr. Teso then told Ms. Pendelton "that 'the Union would be gone in November.'" ALJD 9. Mr. Teso did not deny making any of these statements. ALJD 9. The ALJ specifically found that "the only reasonable

interpretation to attach to Teso's latter remarks is that he expected the Union's departure to be concerrent with the end of the certification year...." ALJD 12.

Although the ALJ specifically credited the testimony of Ms. Bullock as being truthful and specifically discredited the detailed testimony of Ms. Groenendyke, the ALJ ultimately concluded that the statement "adds [no] additional weight to the showing of a discriminatory motive vis-a-vis the wage increase issue...." ALJD 13. The ALJ determined that "Gronendyke's statement (and Teso's similar statement) to the effect that Prohl 'was going to give us a raise until we vote the Union in," is a correct, albeit incomplete assertion that may be viewed either as an admission of discriminatory intent or as an abbreviated and imperfect summary of the rationale readily admitted by the Respondent." Strangely, the ALJ chose to view Respondent's agents' statements as the "abbreviated and imperfect summary" of the Respondent's stated rationale, rather than "an admission of discriminatory intent." Yet, the ALJ had already determined that Gronendyke's specific denial of making such a statement was entirely unbelievable. The only logical conclusion from the ALJ's discrediting Gronendyke's direct testimony is that Gronendyke was hiding Respondent's true motive. Gronendyke would not have had a motive to falsely deny making a statement that was merely an "abbreviated and imperfect summary" of the Respondent's rationale. However, Gronendyke would have certainly had a motive to falsely deny making a statement that was "an admission of discriminatory intent" in Respondent's refusal to provide the Union represented workers with a wage increase in July 2007. As such, the only logical manner to interpret Gronendyke's and Teso's statements is as direct admissions of Respondent's discriminatory motive.

At hearing, bargaining unit member Bobbie McKinley testified that during a June 2008

staff meeting, Susan Balchack, a Development Specialist and Supervisor of the ADA and SAIL programs, told bargaining unit members that they "couldn't get a raise because of the Union" and that "I got mine and you would have gotten yours if you had not belonged to the Union." (Tr. 180, 194, 205). The ALJ's Decision fails to even address this admission by Respondent that it withheld the wage increase because of the workers' Union activities.

Moreover, at hearing Ms. Prohl openly admitted that Respondent withheld the represented workers' wage increase because of their Union activities. She testified that if everything else had been as it was in July 2007, but the Union did not represent the workers, Respondent would have given the bargaining unit workers a three percent wage increase effective July 2007. (Tr. 375). Ms. Prohl provided a number of reasons for Respondent's refusal to provide the Union workers with the cost of living adjustment—several of which directly relate to the workers' protected activities.

First, Ms. Prohl cited the Union's strike authorization vote as a basis for Respondent's refusal to grant the Union represented workers with the three percent wage increase. (Tr. 344 - 345, 380 - 381). Clearly, the workers' right to strike is a protected activity. The ALJ's Decision fails to address this admission.

Ms. Prohl later brazenly admitted that Respondent did not provide the Union workers with the cost of living adjustment because of "all the literature that was coming out from the Union" about Respondent. (Tr. 380 - 381). As such, Respondent once again admitted that it withheld the wage increase in retaliation of the workers' engaging in protected activities. The ALJ's Decision again fails to account for this statement in any way.

In *Choctaw Maid Farms*, shortly after the union won a representation election, while the

employer's objections to the election were pending before the Board, the time for bargaining unit members' to receive their established annual wage increase approached. *Choctaw Maid Farms*, 308 NLRB 521, 527 (1992). Several employees asked the employer whether they would get their annual raise. *Id.* The employer, at various times, responded that "[t]he [u]nion changed all that;" that the employees would "have to go through the [u]nion" for their raises; that they "have everything tied up with the [u]nion;" that they would not get a raise because "[t]he [u]nion and the plant had it tied up in court, and they were negotiating on what to do on this thing;" and that the workers had "messed that up when [they] got the union in." *Id*. At hearing, the employer admitted that the workers would have received a wage increase if they had not chosen the union to represent them. *Id.* The employer claimed that it withheld the wage increase from employees because of its "potential bargaining obligation with the union." *Id.* The Board rejected the employer's defense, reasoning that the employer's statements made it clear that the employer withheld the wage increase in an effort to harm the union. As such, the Board determined that the employer violated the Act by withholding the workers' established wage increase.

The current matter is quite similar to *Choctaw Maid Farms*. In this case, as in *Choctaw Maid Farms*, the judge specifically found that the "annual wage increase in July of each year...had in fact become a condition of employment...." ALJD 11, Fn. 12. Moreover, as in *Choctaw Maid Farms*, Respondent ceased the expected wage increase after the workers voted to be represented by the Union. And, as in *Choctaw Maid Farms*, Respondent admitted that if the workers did not belong to the Union, Respondent would have granted them the wage increase. (Tr. 375). Finally, as in *Choctaw Maid Farms*, Respondent made a number of express statements to bargaining unit members that their wage increases were withheld because of their selection of

the Union as their representative. If anything, the express statements by Respondent were even more straightforward than the statements by the employer in *Choctaw Maid Farms*. Indeed, Respondent's explicit statements could not be more clear. Respondent failed to grant bargaining unit workers the wage increase because of their Union activities.

b. Respondent's history of unfair labor practices shows its discriminatory intent.

Respondent's previous history of unfair labor practices helps establish the basis of Union animus. *Tama Meat Packing Corp. v. NLRB*, 575 F.2d 661, 663 (8th Cir. 1978). Since the Union first initiated its organizing drive, Respondent has exhibited extreme Union animus. Indeed, the ALJ's Decision recognizes "the record evidence of Respondent's general anti-union bias...." ALJD 13. Respondent has engaged in a constant stream of unfair labor practices including suspending and disciplining workers for their Union activities, belittling the Union in the eyes of the workers it represents by making unilateral changes and making a barrage of threats against workers who were thought to support the Union. (CP-2).[4] Respondent even outwardly warned workers that it would withhold their planned wage increase because they supported the Union. (CP-2). When Respondent gave a wage increase to only non-bargaining unit employees effective July 2007, it was simply carrying out its earlier threat.

Respondent's numerous unfair labor practices, and especially, its threat to withhold the bargaining unit members' wage increase, constitute powerful evidence that Respondent was motivated by anti-Union animus.

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[4] "CP-2" refers to Charging Party's Exhibit 2. The assertion is based on information contained in this exhibits. Similar notation is used throughout this document. Hereinafter "GC" refers to General Counsel's Exhibits and "R" refers to Respondent's Exhibits.

c. Respondent's disparate treatment of Union represented workers shows its discriminatory intent.

Respondent's anti-Union motivation is also established by its disparate treatment of workers represented by the Union. *United Rentals*, 349 NLRB No. 83, 11 (2007). Despite the long-established practice of giving the same cost of living adjustment to all workers regardless of their classification, Respondent only granted the 2007 wage increase to unrepresented workers. Indeed, Respondent only used one criteria to determine if an employee would get a wage increase effective July 1, 2007—whether or not they were represented by the Union. As the Board recently affirmed, such "disparate treatment supports an inference of antiunion animus and unlawful motivation." *United Rentals*, 349 NLRB No. 83 at 11.

d. Respondent's departure from established practice shows its discriminatory intent.

Until the workers voted to join the Union, Respondent had consistently followed an established practice of granting all workers the same wage increase effective in July. Respondent's departure from this established practice of providing Union represented employees with a beneficial condition of employment raises an inference of discriminatory intent. *Phelps Dodge Mining Co.*, 308 NLRB 985, 996 (1992), citing *NLRB v. Great Dane Trailers,* 388 U.S. 26, 32 (1967), enforcement denied on other grounds by *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493 (10th Cir. 1994). Indeed, the ALJ's Decision recognizes that "given the record evidence of Respondent's general anti-union bias...coupled with the Respondent's [ceasing its] past practice of giving a wage increase to all employees...a discriminatory intent is clearly plausible." ALJD 13.

In *Kurdziel Iron*, the employer provided wage increases to workers at two facilities in

October 1994 and 1995. *Kurdziel Iron*, 327 NLRB at 155. In October 1994 workers at both facilities received increases of 3.75-percent, and in October 1995 workers at both facilities received increases of 2.75-percent. *Id.* In March 1996, a union was certified as the bargaining representative for the workers at only one of the plants. *Id.* at 159. In October 1996, the employer granted a three percent wage increase only to the workers at the unrepresented plant. *Id.* at 155. Workers at the newly-organized facility did not receive a wage increase. *Id.* The Board held that the employer's two year history of wage increases was sufficient to establish a practice of granting increases at the two facilities that were pegged to one another. *Id.* The Board reasoned that "the fact that the 1995 and 1996 increases were identical...warrants an inference that the [employer] applied common criteria to determine the increase to be given at those facilities, and that if it had continued that practice it would have again granted identical increases at the...facilities in 1996." *Id.* The Board also considered the employer's statement that if the union were voted out the workers would get a three percent increase as further evidence to establish the employer practice of providing the same wage increases to workers at both facilities. *Id.* As such, the Board held that the employer violated Section 8(a)(1)and (3)of the Act by discontinuing its practice of granting an October wage increase to bargaining unit workers, because of their union activities.

The current matter provides a similar set of facts as *Kurdziel Iron*. In the present matter, just as in *Kurdziel Iron*, Respondent has an established history of tying wage increases for bargaining unit members to wage increases for non-bargaining unit members. Here, since at least 1999 when it made significant changes to its staff structure, Respondent has provided an identical cost of living increase to all workers on an across the board basis effective each July.

(Tr. 327, R-12). In July of 1999, 2000, 2001, 2005 and 2006, Respondent gave all workers the same cost of living adjustment, regardless of classification. (R-12). In July of 2002, 2003 and 2004, Respondent gave no workers a cost of living adjustment, regardless of classification. (R-12). Indeed, the history of pegging non-bargaining unit member cost of living adjustments with bargaining unit member adjustments is much more clear in the present matter, where the practice had been in effect since 1999, than in *Kurdziel Iron* where the employer only had a two-year history of giving the same raise to bargaining unit workers and workers outside the bargaining unit.

Moreover, here, unlike in *Kurdziel Iron*, Respondent has actually memorialized its policy of providing the same cost of living adjustments to all workers on an across the board basis. According to the "Salary Philosophy" found in Respondent's program manual, "[c]ost of living increases will be the basis for annual raises, *applied across the corporation*, as appropriate and as resources allow." (GC-8, emphasis added). Moreover, according to Marie Leonhardt, Respondent's Human Resources Director, Respondent uses the terms "cost of living" raise and "across the board increases" interchangeably. (Tr. 245, 318). Nonetheless, the cost of living adjustment effective as of July 1, 2007, was not "applied across the corporation," as it was only applied to those workers not represented by the Union.

Respondent's departure from this firmly established past practice provides yet more strong evidence of its anti-Union motivation. *Phelps Dodge Mining Co.*, 308 NLRB at 996.

e. The timing of Respondent's actions shows its discriminatory intent.

The timing of Respondent's withholding of the bargaining unit members' wage increase

provides further evidence that Respondent refused to provide the raise because of the workers' protected activities. *Kurdziel Iron*, 327 NLRB at 155. Shortly after the workers voted to join the Union, Respondent stopped its established practice of granting the same raise to bargaining unit members that it gave to other workers. Each year, prior to the July 1 start of its fiscal year, Respondent examines its financial status to determine if it can grant a cost of living increase. Respondent withheld the Union represented workers' expected cost of living adjustment at its first opportunity after voting to join the Union.

Moreover, Respondent did not give its unrepresented workers a cost of living adjustment in July 2007, as would be expected. Instead, Respondent waited until the middle of October to provide its unrepresented workforce with the raise and made the increase retroactive. (Tr. 307; CP-5, CP-6, CP-7). The certification year for the Day Services workers represented by the Union ended about one month after Respondent exclusively granted the wage increase to its unrepresented workers. By providing a retroactive cost of living increase to its unrepresented workforce just before the expiration of the Union's certification year, Respondent attempted to encourage workers to decertify the Union with the implied incentive that they would receive the same wage increase as unrepresented workers. *Phelps Dodge Mining Co.*, 308 NLRB at 996.

The ALJ's Decision applied the incorrect standard for determining if the General Counsel has established a prima facie case under *Wright Line*. Contrary to the ALJ's Decision, the General Counsel established the evidence to make a prima facie case that Respondent refused to provide the Union represented workers with a three percent wage increase effective July 1, 2007 because of their Union activities, in violation of Section 8(a)(1) and (3). As such, the Board must modify the ALJ's Decision and Recommended Order.

B. Contrary to the Administrative Law Judge's Decision, Respondent has not proven that it would have withheld the Union represented workers' cost of living adjustment even if they had not engaged in protected activity.

Once the General Counsel establishes a prima facie case for a violation of Section 8(a)(3), both the burden of production and the burden of persuasion shift to the employer to prove by a preponderance of the evidence that it would have taken the alleged discriminatory employment action regardless of the employees' protected activity. *Hunter Douglas, Inc.*, 277 NLRB 1179, 1179 (1985), enforced by 804 F.2d 808 (3rd Cir. 1986). It is not enough for the employer to simply articulate a legitimate nondiscriminatory reason; rather, the employer must actually provide sufficient evidence to persuade the fact finder that the employer would have taken the adverse employment action irrespective of the employees' protected activity. *Hyatt Hotels Corp. dba Hyatt Regency Memphis*, 296 NLRB 259 (1989). An employer must show that its non-discriminatory rationale alone would have justified its adverse employment action. "A judge's personal belief" that the employer's articulated reason was sufficient to warrant the adverse employment action is not "a substitute for evidence that the employer would have relied on this reason alone." *Ingramo Enterprise, Inc.*, 351 NLRB No. 99, slip op. at fn. 10 (2007), citing *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

The ALJ's Decision wrongly concludes that "Respondent has met its *Wright Line* burden of proof by demonstrating it would have taken the identical action for legitimate, non-discriminatory reasons." ALJD 13. Respondent has provided no competent evidence that it would have refused to provide the unit employees with the wage increase if they had not engaged in protected activities.

Although Respondent cited numerous, shifting rationales for withholding the wage

increase from the Union represented employees at hearing, the ALJ's Decision focuses almost exclusively on one. The ALJ based his Decision on Respondent's "apparent rationale" that the parties were in contract negotiations at the time and "the wage increase was all [Respondent] had to offer; under the circumstances as the Respondent viewed them the granting of the wage increase in October, 2007 would have served no useful bargaining purpose; and therefore the Respondent decided to withhold the increase until such time as it could be used to the Respondent's best bargaining advantage." ALJD 12. The ALJ cited Respondent's concerns that during bargaining the Union sought a much larger wage increase than the three percent wage increase it had authorized. ALJD 6. The ALJ's Decision extensively cites Respondent's Executive Director Kris Prohl's testimony in this regard:

> My concern was that we were looking at 50 percent increases [over three years] in wages at a bare minimum is what was on the table. There were significant [proposed] changes across the board in terms of employee benefits and work rules, all kinds of things, which had not had an opportunity to be negotiated. I felt that if we just parceled out the three percent of the 50 percent that was asked for, that, in the first place, that would not do us any good...once we said this is all the money we have and we agreed to use it for this purpose, there's nothing left. ALJD 6.

The ALJ went on to cite an October 12, 2007 Respondent internal memorandum which stated that Union represented employees did not receive their annual wage increase because the Union "has maintained its outrageous demands in negotiations." ALJD 6.

Despite the ALJ's contention, Respondent's purported rationale for withholding the wage increase is "inherently implausible." ALJD 13. Respondent's Board approved the wage increase in June 2007. ALJD 4. Such wage increases were historically given in the beginning of July of each year, and the 2007 raise was, in fact, granted retroactively to July 1, 2007. As such,

Respondent withheld the wage increase on July 1, 2007. However, as the ALJ's Decision recognized, the Union did not make its first wage proposal until July 10, 2007—at least a week-and-a-half after Respondent would have had to have decided not to give the workers their raise. ALJD 3. As such, Respondent simply could not have, as it claimed, refused to provide the normal annual wage increase because of the Union's wage proposal.

In any case, the Union's presenting wage proposals is clearly protected activity under the Act. By conceding that it withheld the workers' wage increase because of the substance of the Union's proposals, Respondent is openly admitting that it made its decision because of—not in spite of—the workers' protected activities. As such, Respondent cannot possibly prove that it would have withheld the Union represented workers wage increase regardless of the workers' protected activities.

Moreover, the ALJ's Decision erroneously relies upon Respondent's argument that it withheld the wage increase because if it had granted the raise it would have "thereafter bargain[ed] with no ability to make an additional monetary offer...." ALJD 11. Respondent essentially claimed that it withheld the wage increase so that the money could be used as leverage in the pending first contract negotiations. Respondent's argument is basically the same as that rejected by the Second Circuit in *NLRB v. United Aircraft Corp.*, 490 F.2d 1105 (2nd Cir. 1973). In *United Aircraft Corp.,* an employer withheld a wage increase shortly after the union was certified as the workers' bargaining representative, claiming that "it was entitled to withhold the wage increase in order to improve its bargaining position in the anticipated negotiations with the Union." *Id.* at 1108, 1110. The employer maintained "that it was not required to grant the increase as a 'down payment' to the Union but could lawfully make it part of the 'entire

economic package' to be offered." *Id.* at 1110. Affirming the Board's decision that the employer violated Section 8(a)(1) and (3) of the Act, the Court rejected the employer's argument. *Id.* The Court reasoned that "[i]f the Company's position were accepted, an employer would appear to be entitled, in the hope of improving his bargaining position, to alter all conditions of employment after union certification, reducing wages to the legal minimum and allowing the work environment to deteriorate." *Id.* Respondent here must not be permitted to escape accountability by hiding behind its bargaining obligations.

The ALJ's Decision also cites Respondent's claim that it feared providing a three percent wage increase would have for some reason infuriated the Union. ALJD 5. While the notion that getting no wage increase would keep workers happier than getting a three percent wage increase is bizarre and illogical on its face, Respondent's actions make its assertion even more unbelievable. Respondent never indicated the possibility of providing a cost of living adjustment for either the represented or unrepresented workers to the Union at, or away from, the bargaining table. (Tr. 381). Moreover, at the time the Respondent gave the unrepresented workers the wage increase it had not yet made a single wage offer; as such, the Union certainly would have viewed even a three percent wage increase as being a dramatic improvement over Respondent's bargaining position. Moreover, when Respondent finally made a wage proposal, it never offered as much as three percent. ALJD 7.

The ALJ's Decision also cites Ms. Prohl's claim that Respondent offered the wage increase exclusively to its unrepresented workforce because Respondent had concerns over what it considered to be high turnover amongst management. ALJD 6. However, Respondent gave the raise to all unrepresented workers, including a significant number of non-management

employees. (Tr. 360 - 363; R-8). Respondent's sole criteria to determine if an employee would get a wage increase was whether or not they were represented by the Union—not whether they were in management. The ALJ's Decision fails to recognize this fact, although it directly undercuts the Respondent's rationale for withholding the wage increase from Union represented workers. Moreover, the turnover is nearly as high amongst Union represented workers as it is amongst unrepresented workers. (Tr. 401 -403). As such, Respondent's stated business justification for failing to grant the cost of living adjustment to represented workers is pretextual.

The ALJ's Decision also mentions Respondent's concern that it would be charged with bad faith bargaining if it had granted the Union represented workers a wage increase. ALJD 5. However, the Board has long held that while negotiating a collective bargaining agreement, employers are not entitled to unilaterally change the existing terms and conditions of employment—including the established practice of regularly granting wage increases. *NLRB v. Katz*, 369 US 736, 747 (1962); *Kurdziel Iron*, 327 NLRB at 155. The ALJ's Decision recognized that "it seems clear...that an annual wage increase in July of each year...had in fact become a condition of employment which the Respondent was not privileged to unilaterally change." ALJD 11, fn. 12. As such, by withholding the wage increase, Respondent was actually subjecting itself to a bad faith bargaining charge, rather than protecting itself as it claimed at hearing.

At hearing, Respondent articulated a number of other rationales for withholding the cost of living adjustment from only the Union represented workers that the ALJ's Decision simply ignores. Respondent brazenly admitted that it would not have withheld the wage increase if the Union did not represent the workers. (Tr. 375). On several occasions, Respondent's Executive

Director Kris Prohl attempted to justify the refusal to provide the raise, citing the workers' protected activities. Specifically, Ms. Prohl pointed to the Union's strike authorization vote and distribution of literature critical of Respondent as bases for withholding the Union represented workers' cost of living adjustment. (Tr. 344 - 345, 380 - 381). In so doing, Respondent actually openly admitted that it refused to grant the workers' wage increase because they engaged in protected activities. The ALJ's Decision completely disregards these admissions.

Contrary to the ALJ's Decision, Respondent failed to prove that it would have withheld the Union represented workers' wage increase regardless of the workers' protected activities. As such, Respondent has violated Section 8(a)(1) and (3) of the Act, and the Board must modify the ALJ's Decision and Recommended Order.

III. CONCLUSION

Charging Party American Federation of Professionals respectfully submits that the record evidence and arguments set forth above, directly contradict the ALJ's Decision and Recommended Order. As such, the Union respectfully requests that the Board grant its Exceptions, overrule the ALJ, and conclude that Respondent unlawfully refused to provide the bargaining unit employees with a pay increase effective July 2007, in violation of Section 8(a)(1) and (3) of the Act. Further, the Union requests the Board to modify the Findings and Conclusions and issue an amended Order directing Respondent to make all bargaining unit members whole for any loss of pay that they may have suffered as a result of the unlawful refusal to provide the three percent wage increase, with appropriate interest; reimburse any unit employee or former employee entitled to a monetary award in this matter for any extra federal, state and/ or local income taxes that may result from their receipt of a lump sum distribution;

post an appropriate Notice to Employees at all of its facilities where such notices would normally be posted; and any other action deemed appropriate by the Court.

Dated at Pittsburgh, PA, this 16th day of February, 2009.

Respectfully Submitted,

/s/ Joseph Cohen /s/

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF OF CHARGING PARTY AMERICAN FEDERATION OF PROFESSIONALS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE has been sent this 16th day of February 2009 by overnight mail to Raymond C. Haley, III, Attorney for Respondent, Woodward, Hobson & Fulton, LLP, 2500 National Tower, 101 South 5th Street, Louisville, Kentucky 40202-3175; and Jeanette Schrand, Counsel for the General Counsel, National Labor Relations Board, Region Thirteen, 209 South LaSalle Street, Chicago, IL 60604.

_/s/ Joseph Cohen /s/_____
Joseph Cohen